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No. 93-1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANR PIPELINE COMPANY, *et al.*,
Petitioners,
v.
DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR WESTERN RESOURCES, INC., UTILICORP UNITED INC., KANSAS CITY POWER & LIGHT COMPANY, AND SPRINT COMMUNICATIONS CO., L.P., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF WESTERN RESOURCES, INC., UTILICORP UNITED INC., KANSAS CITY POWER & LIGHT COMPANY, AND SPRINT COMMUNICATIONS CO., L.P., FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Western Resources, Inc., Utilicorp United Inc., Kansas City Power & Light Company, and Sprint Communications Co., L.P. hereby move pursuant to Rule 37.2 for leave to file a brief as *Amici Curiae* supporting the Petitioners in this case. A motion is necessary because Respondent, Director of Property Valuation, Department of Revenue of the State of Kansas, has refused to consent to the filing of the brief.

The Kansas Supreme Court held below that state constitutional mandates of uniform and equal property tax treatment, as well as the federal constitutional guarantee of equal protection, were not violated by substantial un-

disputed disparities in treatment [1] within the class of public utilities. The court below held that the preemptive effect of the Railroad Revitalization and Regulatory Reform Act of 1976 [2] mandated these disparities. The state court holding directly affects the interest of all public utilities operating in the State of Kansas, and has implications beyond Kansas to the extent that unfair taxation within Kansas increases the cost of utility services throughout the nation. Movants are public utilities that were at all material times classified along with railroads and pipelines as "public utilities" for the purpose of Kansas property taxation, and are therefore directly affected by the holding of the court.

Movant Western Resources, Inc. with its operating groups, Kansas Gas and Electric Company, KPL and Gas Service Co., is a combination natural gas and electric utility serving customers in Kansas and Oklahoma. The Company's corporate offices are in Topeka, Kansas, and it maintains operation headquarters in both Topeka and Wichita.

Movant Kansas City Power & Light Company is an electric utility that generates and distributes electricity to about 419,000 customers in a 4,700 square mile area located in 23 counties in western Missouri and eastern Kansas.

Movant Utilicorp United Inc. is an electric and gas utility operating in nine states (including Kansas) and one Canadian province. The company is headquartered in Kansas City.

Movant Sprint Communications Co., L.P. is a multi-state/multi-national telecommunications company providing long-distance telephone service in Kansas and across

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[1] The extent of these disparities and the undisputed nature thereof is discussed in the proposed Brief of Amici Curiae at note 2.

[2] Pub. L. No. 94-210, 90 Stat. 54 (1976), currently codified at 49 U.S.C. § 11503 (hereinafter "the 4-R Act").

the nation. The Company was founded in Abilene, Kansas, and maintains its world headquarters in Westwood, Kansas. In addition to serving a substantial customer base in Kansas, Sprint's long-distance division monitors its nation-wide traffic from National Operations Control Center in Overland Park, Kansas.

When considered collectively, movants, Western Resources, Inc., Kansas City Power & Light Company, and Utilicorp United Inc. provide gas and/or electric service for the majority of the industrial and residential consumers in Kansas. Movant, Sprint Communications Co., L.P. is one of the major telecommunications companies present in and serving the State of Kansas. By virtue of their long familiarity and involvement in the assessment and taxation of public utilities in Kansas, movants can assist the Court in understanding the vital importance of the issues presented by the Petitioners.

Since territorial days, Kansas has championed the uniform and equal treatment of taxpayers for property tax purposes, and as recently as 1986 the people of Kansas reaffirmed by constitutional amendment the importance of uniformity and equality within the class of public utilities. The Kansas Supreme Court's holding that federal law requires a dramatic departure from these long established principles is in direct conflict with a recent decision of this Court. Moreover, disparities within the class of public utilities resulting from the state court decision present a clear opportunity to endorse the continued vitality of this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). Movants have a direct interest in the elimination of discrimination in property taxation among public utilities in Kansas, and in the restoration of an appropriate accommodation of state and federal interests on this important issue.

For these reasons, movants ask leave to file the accompanying brief.

Respectfully submitted,

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Dated July 13, 1994

QUESTIONS PRESENTED

This brief *amici curiae* addresses the following questions:

(1) Whether the Kansas Supreme Court decision conflicts with this Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994), in its failure to acknowledge that the State's discriminatory property tax treatment had no basis in federal law, and in its holding of preemptive effect of federal law beyond, and contrary to, this Court's recent holding?

(2) Whether *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989), continues to prohibit systematic discriminatory property tax treatment where that unequal treatment does not arise from any state purpose, but rather stems from an incorrect interpretation of a federal statute?

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BRIEF FOR WESTERN RESOURCES, INC., UTILICORP UNITED INC., KANSAS CITY POWER & LIGHT COMPANY, AND SPRINT COMMUNICATIONS CO., L.P., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici, Western Resources, Inc., Utilicorp United Inc., and Kansas City Power & Light Company, are investor-owned gas and/or electric public utility companies that together serve the majority of industrial and residential consumers in Kansas. *Amicus* Sprint Communications Co., L.P. is a major multi-state/multi-national telecommunications company with its world headquarters in Kansas providing substantial long-distance services to customers in Kansas and across the nation. All four *Amici* were classified at all material times under the Kansas Constitution along with pipelines and railroads as

"public utilities" for property tax purposes, and are entitled by constitutional mandate in Kansas to uniform and equal treatment within their class. Accordingly, *Amici* are similarly situated public utility taxpayers and entitled to equal property tax treatment by virtue of the equal protection clause of the U.S. Constitution.

The Petition seeks review of a Kansas Supreme Court decision that refused to remedy discrimination within the established class of public utilities in Kansas. The resulting disparities within the class of public utilities in Kansas are of no less concern to *Amici* than to the Petitioners. *Amici* file this brief to respectfully urge the Court to grant certiorari to review the Kansas Supreme Court decision, which fails to consider a recent decision of this Court, fails to apply the proper equal protection analysis, and upholds discrimination in property tax treatment among public utilities in Kansas based on an erroneous application of federal statutory and constitutional law.

SUMMARY OF ARGUMENT

1. This Court should grant the Petition For Writ Of Certiorari because the Kansas Supreme Court's decision is in direct conflict with this Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994), *rev'g*, 961 F.2d 813 (9th Cir. 1992). The disparities within the class of public utilities in Kansas are the result of railroad property tax settlements, which, in light of *ACF Industries*, have absolutely no justification in state or federal law. The Kansas Supreme Court ignored the extent to which this Court undermined the purported basis for the railroad settlements in Kansas by its holding in *ACF Industries*. In addition, the court below erroneously construed federal law as having a preemptive effect beyond and contrary to this Court's interpretation of the Railroad Revitalization and Regulatory Reform Act of 1976.[1] The discriminatory acts of Kansas

[1] Pub. L. No. 94-210, 90 Stat. 54 (1976), currently codified at 49 U.S.C. § 11503 (hereinafter "the 4-R Act").

taxing authorities, which result in inequities among public utility taxpayers in Kansas, cannot be justified after this Court's decision in *ACF Industries*. These clear conflicts between the decisions on important issues of federal law justify review by this Court, or, at a minimum, summary reversal, vacatur, and remand for consideration in light of *ACF Industries*.

2. The second basis for granting the Petition is that it presents an important question of federal constitutional law that is unsettled in the courts below. The Kansas Supreme Court acknowledged that state law required a uniform and equal basis for valuation and rate of taxation among members of the same class. That court also implicitly acknowledged that the railroad settlements destroyed uniform property tax treatment among public utilities. The court justified the discriminatory tax treatment received by the Petitioners, however, by the mistaken conclusion that to do so was required by the 4-R Act. In light of this Court's recent decision in *ACF Industries*, which removes all rationale for upholding the state actions that resulted in Petitioners receiving discriminatory treatment, that conclusion is devoid of support. Accordingly, this case cries out for application of the equal protection clause of the Fourteenth Amendment, and presents an opportunity for this Court to address whether *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989) continues as a limitation on a state's power to discriminate in matters of property taxation.

The decision below is inescapably based on erroneous construction and application of federal statutory and constitutional law. The broad sweeping preemption of long-established principles of state constitutional law simply cannot be squared with *ACF Industries*. The railroad settlements are devoid of any legal basis after *ACF Industries*. The resulting unjustified discrimination is precisely that which cannot survive application of this

Court's equal protection analysis in *Allegheny*. This case presents compelling reasons for review by this Court.

ARGUMENT

I. THE KANSAS SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *ACF INDUSTRIES*

This Court traditionally has granted certiorari to review decisions of state courts addressing federal questions that conflict with decisions of this Court. *See, e.g., Dolan v. City of Tigard*, 62 U.S.L.W. 4576 (1994). For example, in cases that touch the accommodation of state and federal interests under the U.S. Constitution, *see, e.g., Oregon Waste Systems, Inc. v. Oregon Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994), or when a state decision addresses preemption of state law by federal statute or treaty, *see, e.g., Hawaiian Airlines, Inc. v. Norris*, 62 U.S.L.W. 4537 (1994); *American Dredging Co. v. Miller*, 113 S.Ct. 1840 (1994), this Court has often granted certiorari.

It is well settled that accommodation of state and federal interests in local property taxation of railroads encompasses important federal questions that command this Court's attention. *See, e.g., Central Railroad Co. of Pennsylvania v. Pennsylvania*, 370 U.S. 607 (1962); *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987). Recently this Court reviewed a state decision that addressed the preemptive scope of the 4-R Act and the accommodation of state interests in railroad taxation. *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843 (1994), *rev'g*, 961 F.2d 813 (9th Cir. 1992).

State court decisions reflect growing confusion about the inherent tensions and the appropriate accommodation of interests among state power to tax, federal interests manifest in the 4-R Act, and the constitutional rights of

taxpayers. *Compare Northern Natural Gas Co. v. State Board of Equalization & Assessment*, 443 N.W. 2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990) with *Appeal of ANR Pipeline Co.*, 254 Kan. 534, 866 P.2d 1060 (1994); *see also, State v. Colonial Pipeline Co.*, 471 So.2d 408 (Ala. Civ. App. 1984); *Federal Express Corp. v. Tennessee State Bd. of Equalization*, 717 S.W.2d 873 (Tenn. 1986); *Kennecott Corp. v. Utah State Tax Comm'n*, 858 P.2d 1381 (Utah Ct. App. 1993). As the paramount expounder of federal law of national significance, this Court should assure that *ACF Industries* is followed, clarifying where necessary its application and constitutional ramifications.

Amici urge the Court to grant certiorari because the decision of the Kansas Supreme Court is in substantial conflict with this Court's decision in *ACF Industries* on two important federal questions. First, the Kansas Court wholly failed to appreciate that this Court undermined any legal basis for the railroad property tax settlements in Kansas. Second, the Kansas Court interpreted the 4-R Act to have preemptive effect beyond, and contrary to, this Court's construction of that Act.

It is not clear whether the Kansas Court had an adequate opportunity to analyze and apply *ACF Industries*. Although this Court's decision was issued three days after the decision of the Kansas Supreme Court, and was cited in Petitioners' Motion for Rehearing, the record does not indicate how or even whether the Kansas Court reconciled its holding with this Court's decision in *ACF Industries*. In the event that this Court is not inclined toward a comprehensive review of the decision below, certiorari should be granted for a summary reversal, vacatur and remand for reconsideration, in light of *ACF Industries*.

A. *ACF Industries* Undermined Any Legal Basis For The Railroad Settlements In Kansas.

The type of 4-R tax relief invalidated by *ACF Industries* is essentially identical to that received by railroads in Kansas. In the Kansas settlements, certain railroads and the state taxing authorities agreed to specific tax relief, including a deduction of 80% of railroad personal property prior to application of the constitutionally established assessment rate.[2] The settlements in Kansas granted the identical relief sought by, but denied to, the railroads by this Court in *ACF Industries*.

Kansas taxing authorities entered into the settlements after certain railroads brought suit alleging a violation of the 4-R Act. The Consent Decrees that formalize the settlements recite the fact that the railroad's property "did not qualify" for statutory exemptions afforded other taxpayers for grain, farm machinery, motor vehicle inventories, etc. Operating under the mistaken belief that this was a violation of the 4-R Act, the settlements granted to railroads that same aggregate exemption that was enjoyed by other commercial and industrial taxpayers, even though the railroads' personal property was technically and legally ineligible for such exemptions. Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes, *Burlington Northern R.R. Co. v. Rolfs*, No. 89-4124-R (D. Kan. Aug. 11, 1989). *ACF Industries* clearly held that railroads were *not* entitled to the

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[2] As reflected in the decision of the court below, the settlements affected both real and personal property. Instead of the constitutional assessment rate of 30% for realty, the state agreed to give railroads a rate of 25% and 22.3% respectively for 1990 and 1991. The Petitioners' principal complaint, however, is that the state gave the railroads an 80% deduction of taxable personal property before application of the constitutional rate of 30%. This unprecedented tax break led to "vast disparities" between the railroads' tax burden and that placed on other public utilities, with the other public utilities at a level five times the effective rate for railroads. *See, Appeal of ANR Pipeline Co.*, 254 Kan. at 538.

benefit of such exemptions. 114 S. Ct. at 851. Accordingly, the principal impact of this Court's decision is to strip the acts of taxing authorities in Kansas of all legal justification in federal law. After *ACF Industries*, the acts of Kansas taxing authorities *vis a vis* Petitioners and *Amici* are arbitrary, discriminatory actions that cannot be justified by state or federal law.

ACF Industries and the decision below are in direct conflict. This Court held that railroads are *not* entitled to the benefit of property tax exemptions the state may grant to preferred property owners. In direct conflict, the Kansas Supreme Court upheld tax discrimination that resulted when the state granted that very exemption to certain members of the public utility class. In so ruling, the Kansas Supreme Court upset the proper accommodation of state and federal interests established by this Court's construction of the 4-R Act. Since this Court clearly has held that no such federal requirement exists, the Kansas Court should be free to address the existing state constraints upon property tax discrimination among public utilities *without* the interference created by that Court's incorrect determination of federal law.

B. The Kansas Supreme Court Construed The 4-R Act To Have Preemptive Effect Beyond And Contrary To This Court's Construction In *ACF Industries*.

In *ACF Industries*, this Court confined the preemptive effect of the 4-R Act to assessment rates *only*, and admonished against broadening the scope of any preemption beyond the "clear and manifest purpose of Congress", especially where the statute impinges upon or preempts the States' traditional powers. *ACF Industries*, 114 S. Ct. at 851. This Court always has required careful statutory analysis to assure that the extent of any preemption is appropriately limited consistent with congressional intent, the ultimate touchstone of the Court's inquiry. *Malone v. White Motor Corp.*, 435 U.S. 497,

504 (1978). Under the relevant test, there is no preemption absent a direct conflict between the state and federal law. *Id.* Indeed, as noted by this Court in *ACF Industries,* principles of federalism *compel* this view. 114 S. Ct. at 850.

The Kansas Supreme Court's decision presents no analysis to support the underpinning of its erroneous conclusion that "[t]here can be little doubt that this is a preemption. . . ." *Appeal of ANR Pipeline Co.,* 254 Kan. at 543. Of paramount significance, however, is the inescapable conclusion that the Kansas Court's holding that the 4-R Act requires a broad preemption of state classification systems and state uniform and equal mandates is in direct conflict with *this* Court's narrow preemption analysis in *ACF Industries.* The erroneous construction of the 4-R Act by the court below effectively shields state taxing authorities from state statutory or constitutional scrutiny. In fact, the decision is a license to perpetuate or extend the discrimination practiced among public utilities under the badge of an erroneous federal preemption.

This Court clearly held in *ACF Industries* that the strict construction and narrow preemptive effect of the 4-R Act urged by Petitioners below is required. Noting that the legislation "does not speak with any degree of particularity to the question of tax exemptions" this Court examined the prevalence of exemption schemes when the Act was drafted, and found through the Act's silence no congressional intent to disturb such exemptions.

The parallels between *ACF Industries* and this case are readily apparent. Similar to *ACF Industries,* "the statute does not speak with any degree of particularity to" the question of classification systems. Just as property tax exemptions are "an important aspect of state and local tax policy", so are property tax classification schemes. Just as exemptions were common when the Act was drafted, so were classification schemes. In fact, federal courts have consistently found no intent to inter-

fere with traditional classifications of property by the states. *See, e.g., ABF Freight System, Inc. v. Tax Div. of Arkansas Public Service Comm'n,* 787 F.2d 292, 295-96 (8th Cir. 1986). Had Congress intended to forbid the classification of railroads with other taxpayers it could have done so; the 4-R Act's silence as to classification schemes "reflects a determination to permit the States to leave [such classifications] in place." *ACF Industries,* 114 S. Ct. at 850.

The direct conflict between the two decisions is that this Court expressly held that the preemptive effect of the 4-R Act is limited to assessment rates, whereas the Kansas Supreme Court assumed a broad sweeping preemptive effect that undermined not only the Kansas classification systems but also the state constitutional mandate of uniformity and equality. The important federal question is the correct preemptive effect of the 4-R Act; state and federal interests cannot be accommodated appropriately in the absence of uniform construction of this important legislation. States should not be permitted to explain away inequalities in taxation on the basis of a federal preemption beyond and contrary to that acknowledged by this Court.

In any event, the broad preemptive effect erroneously concluded by the Kansas Supreme Court absent any preemption analysis is simply unwarranted. Not only has *ACF Industries* exposed and undermined any legal basis for the discriminatory actions of taxing authorities in Kansas, it has established a construction of the preemptive effect of the 4-R Act that clearly conflicts with that concluded by the Kansas Supreme Court. As the paramount expounder of federal law, this Court should assure that *ACF Industries* be followed, clarifying where necessary its application and constitutional ramifications. The Petition For Writ Of Certiorari should be granted for these reasons alone.

II. THE WRIT SHOULD BE GRANTED TO DETERMINE THE EXTENT TO WHICH *ALLEGHENY* REMAINS THE LAW OF THE LAND.

The present case presents an opportunity for the Court either to reaffirm the vitality of *Allegheny* as a continuing check on the power of state taxing officials, or to clarify the role of that case following *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). Despite its express endorsement and distinction of *Allegheny*, the *Nordlinger* decision has cast doubt on the continuing vitality of *Allegheny*.[3] The holdings of these two cases have resulted in uncertainty.[4] As one state supreme court noted after *Nordlinger*, "the precise contours of the federal Equal Protection Clause in the context of state taxation are far from clear." *Jaksha v. Nebraska*, 241 Neb. 106, 486 N.W.2d 858, 864 (1992). The correct application of equal protection in the context of state taxation is an issue of national significance deserving this Court's attention. *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923).

In *Nordlinger*, this Court upheld California's constitutional property tax classification system, rejecting a challenge that California's system, which treated similar valued property in disparate ways, violated the Fourteenth Amendment's equal protection clause. To reach this conclusion, this Court distinguished *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989), where a taxpayer challenged a county assessor's taxation procedures that resulted in the taxpayer's property being

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[3] *See, e.g.*, M. Rawlins, *Taxation, Equal Protection, and Inquiry into the Purpose of a Law: Nordlinger v. Hahn and Allegheny Pittsburgh Coal Co. v. County Commission*, 1993 B.Y.U.L. Rev. 1001.

[4] *See, e.g.*, S. Mandarino, *Nordlinger to Allegheny: "This Town Ain't Big Enough for the Both of Us,"* 1993 Wis. L. Rev. 1195, 1223 ("By failing to overrule *Allegheny* directly, the Court has left equal protection doctrine in a state of disarray").

systematically assessed at significantly higher rates than similarly situated property.

Nordlinger distinguished *Allegheny* on the ground that in *Allegheny* the county assessor's unequal assessments were not made to further a legitimate state purpose served by the unequal assessment practices.[5] The Court noted that although "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification[,] . . . this Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 112 S.Ct. at 2336, 2343. *Allegheny* presented a case "where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve" legitimate state purposes. *Id.* This case resulted, in large part because the West Virginia Constitution and laws required uniform taxation of similarly situated property.

Here, as in *Allegheny*, Petitioners challenged action by taxing authorities that systematically treated them less favorably than certain other similarly situated taxpayers. This dissimilar treatment was not justified on the basis of any legitimate state purpose. Like the actions in *Allegheny*, the challenged actions did not reflect the decision of state lawmakers that the unequal treatment was required to achieve some legitimate state goal. The discrimination, resulting from the railroad property tax settlements, resulted in certain railroads receiving tax exemptions and tax assessment treatment that was contrary to the clear state policy of Kansas that all public utilities were to be treated uniformly in matters of taxation. This public policy was endorsed and perpetuated in 1986, when Kansas amended its constitution to classify railroads

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[5] In *Nordlinger*, Justice Thomas and Justice Stevens both concluded that *Allegheny* could not be distinguished. 112 S.Ct. at 2336, 2343.

with all other public utilities and to require all members of the class to be taxed uniformly.

Nordlinger reaffirmed the requirement that discriminatory tax treatment can only be justified when a reviewing court can determine that a legitimate state purpose "may reasonably have been the purpose and policy" of the disparate treatment. 112 S.Ct. at 2334. In *Allegheny,* the actions of such a relevant decisionmaker that caused discriminatory treatment and were directly inconsistent with state policy were held to violate the equal protection clause of the Fourteenth Amendment. In the present case, where a state decisionmaker caused a systematic undervaluation of property that was required by state law to be treated uniformly with the Petitioners' property, the Kansas Supreme Court erroneously upheld the actions as not being a violation of the equal protection clause of the Fourteenth Amendment.

The decision of the Kansas Supreme Court to uphold the Kansas taxing official's actions in the face of state law that required uniform treatment was based on an erroneous interpretation of the 4-R Act. Because that rationale cannot control after *ACF Industries,* the facts of this case are precisely those that this Court confronted in *Allegheny.* Accordingly, the Court should grant review to affirm that *Allegheny* retains vitality, and that "palpably arbitrary" discrimination among taxpayers that are similarly situated and classified together for taxation, cannot pass constitutional muster.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Dated July 13, 1994